Editor's Note: filed appeal in U.S. Court of Federal Claims (so not directly challenging IBLA decision), No. 92-391, dismissed, (Sept. 30, 2003)

UNITED STATES
v.
KENT BUSH

IBLA 2001-154 Decided October 31, 2002

Appeal from a decision by Administrative Law Judge William E. Hammett declaring the Rocky Top Nos. 5, 7, and 8 lode mining claims (NMC 332808, 332810, and 332811, respectively), and the Pamgold Nos. 1, 8, 12, and 15 (NMC 89323, 214619, 214620, and 214621, respectively) placer mining claims null and void. N-600-80.

Administrative Law Judge's Decision Adopted and Affirmed.

1. Mining Claims: Discovery: Generally--Mining Claims: Determination of Validity--Mining Claims: Placer Claims

To be valid, a mining claim must be supported by the discovery of a valuable mineral deposit. To establish a discovery, there must be exposed within the limits of a claim a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine.

2. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity

When the Government challenges the validity of a mining claim, it has the burden of establishing a prima facie case that the claim is invalid. Once a prima facie case has been established, the burden shifts to the contestee to overcome that case by a preponderance of evidence. At the end of the Government's case a claimant may move the presiding administrative law judge to dismiss the contest for failure to present a prima facie case. However, if evidence and testimony is presented by the contestee, the Administrative Law Judge may consider both the Government's evidence and that presented by the claimant. Even where the Government has failed to present a prima facie case, evidence tendered

> by a contestee may be considered for the purpose of determining whether this evidence, considered with all other evidence of record, affirmatively establishes that the claims are invalid.

APPEARANCES: Kent Bush, pro se, San Diego, California; John W. Steiger, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Kent Bush has appealed a January 12, 2001, decision of Administrative Law Judge William E. Hammett declaring the Rocky Top Nos. 5, 7, and 8 lode mining claims (NMC 332808, 332810, and 332811, respectively), and the Pamgold Nos. 1, 8, 12, and 15 placer mining claims (NMC 89323, 214619, 214620, and 214621, respectively) null and void for lack of discovery of a valuable mineral deposit. Judge Hammett's decision ably and succinctly stated the issues presented, determined the facts, and correctly applied the law to the facts found, and accordingly, we hereby adopt his decision as the decision of this Board, a copy of which is appended hereto as Attachment 1. For clarity's sake, however, we will here repeat the essential facts.

The Pamgold No. 8 is wholly within the Hawthorn Army Depot (Depot), whereas the Pamgold Nos. 12 and 17 are partly within the Depot. The surface of the land occupied by the Depot and in part by the Pamgold claims was withdrawn from appropriation for use by the Navy as an ammunition depot by Executive Order (EO) 4531 dated October 27, 1926. However, as the EO recites, under the Act of June 25, 1910 (30 Stat. 847), popularly known as the Pickett Act, as amended by the Act of August 24, 1912 (37 Stat. 497), the land remains open to location of metalliferous minerals. 1/ (EO 4531, Fig. 2 in 1995 Mineral Report, infra.) See also James Aubert, 130 IBLA 50, 52-53 (1995); N.W. Brown, 112 IBLA 225, 226 (1989); David E. Hoover, 99 IBLA 291, 293 (1987); Pathfinder Mines Corp., 70 IBLA 264, 271-72 (1983); Sherman C. Smith, 58 IBLA 189, 190 (1981). The balance of the land embraced by appellant's claims is public land administered by the Bureau of Land Management (BLM).

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1/ Section 1 of the Act of June 25, 1910, authorized the President to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States * * * and reserve the same for * * * classification of lands, or other public purposes to be specified in the orders of withdrawals." Ch. 421, 36 Stat. 847 (1910). That authority was delegated to the Secretary of the Interior by EO No. 10355. 17 FR 4831 (May 26, 1952). As originally enacted, section 2 of the Pickett Act provided that lands withdrawn under its authority were to remain open under the mining laws for the location of "minerals other than coal, oil, gas, and phosphates." Ch. 421, 36 Stat. 847 (1910); Jonathan Z. Herod, 121 IBLA 339, 342 (1991); Seth M. Reilly, 112 IBLA 273, 276 (1990). Section 2 of the Pickett Act was amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497, to substitute "metalliferous minerals" for "minerals other

Following a field examination of the claims in March 1995 and the recommendation to initiate contest proceedings based on lack of a discovery, a contest complaint (N-600-80) was issued in October 1995, to which appellant timely responded. 2/ A hearing in the matter was held on May 13, 1999, at which the parties stipulated that neither the Rocky Top Nos. 5, 7, and 8 lode mining claims nor the Pamgold No. 1 had a discovery within their boundaries, and that those claims thus were properly declared null and void. The central issue in the case was whether Bush's Pamgold Nos. 8, 12, and 15 mining claims were supported by the discovery of a valuable mineral deposit. A second issue surfaced when Bush, through the testimony of his expert witness, alleged that he had been denied access to his claims by the Army. In United States v. J. Gary Feezor, 130 IBLA 146, 189-190 (1994), 3/ this Board set forth the following principles and law that control disposition of this appeal.

[1] To be "valid," a mining claim must be supported by the discovery of a valuable mineral deposit. See, e.g., Cameron v. United States, 252 U.S. 450, 459 (1920); Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971). Traditionally, a discovery has been said to exist where the evidence is such that a prudent individual would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man" test has been refined to require a showing that the mineral disclosed is "presently marketable at a profit," which means that the mining claimant "must show that as a present fact, considering historic price and cost factors and

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fn. 1 (continued)
than coal, oil, gas, and phosphates." Section 704(a) of FLMA further amended section 2 of the Pickett Act to delete the entire phrase, opening withdrawn lands to limited mineral entry. As amended, section 2 of the Pickett Act is codified as 43 U.S.C. § 142 (1994).

Section 1 of the Pickett Act was codified at 43 U.S.C. § 141 (1970), and was subsequently repealed by section 704(a) of the Federal Land Policy and Management Act (FLPMA), 90 Stat. 2743, 2792 (1976). The repeal was made subject to a savings provision, which preserved withdrawals in effect as of Oct. 21, 1976. See FLPMA, 90 Stat. 2786 (1976); David E. Hoover, 99 IBLA 291, 293 (1987).

2/ The complaint was served on Kent Bush, Barbara C. Bush, H.R. Eddy, J.M. Reynolds, Everett Loving, and Abbie Jean Bush Jones. Kent Bush was the only individual who timely responded to the contest complaint and requested a hearing, and the only individual who appealed Judge Hammett's decision. (Decision, Tab 9; Notice of Appeal, Tab 8, Vol. 2 of Administrative Record.) The parties stipulated at the hearing that, as to the contestees who failed to answer, the allegations of the complaint were admitted, the contested mining claims were null and void for lack of a discovery, and further service on them was not necessary. (Tr. at 38-39.)

3/ Appeal filed sub nom., National Credit Union Board et al. v. Babbitt, Civ. No. F-00-6772 GEB JFM (E.D. Cal. Aug. 3, 2000), appeal dismissed with prejudice (Mar. 15, 2002).

assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). Determining that a prudent individual would be justified in attempting to develop a paying mine necessarily involves consideration of whether a mineral deposit has been exposed within the limits of a claim and, if so, whether the evidence is such that an individual would be justified in concluding that the mineral exposed exists in sufficient quantity and quality so as to make expectations of its profitable extraction reasonable under the facts of record. See, e.g., Chrisman v. Miller, supra at 322; Thomas v. Morton, 408 F. Supp. 1361, 1371-72 (D. Ariz. 1976), aff'd, 552 F.2d 871 (9th Cir. 1977); Converse v. Udall, 399 F.2d 616, 620-21 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] When the Government challenges the validity of a mining claim, it bears the burden of establishing a prima facie case that the claim is invalid. Once a prima facie case has been established, the burden shifts to the contestee to overcome that case by a preponderance of evidence. At the end of the Government's case a claimant may move the presiding administrative law judge to dismiss the contest for failure to present a prima facie case. However, if evidence and testimony is presented by the contestee, the Administrative Law Judge may consider both the Government's evidence and that presented by the claimant. Even where the Government has failed to present a prima facie case, evidence tendered by a contestee may be considered for the purpose of determining whether this evidence, considered with all other evidence of record, affirmatively establishes that the claims are invalid.

To briefly recite the relevant facts, Luther Clemmer, a consulting mining engineer who has had extensive experience in performing mineral examinations, and Daniel J. Jacquet, a certified BLM mineral examiner and professional geologist, were called as the Government's expert witnesses and duly qualified as such. Bush appeared pro se with his expert witness, Richard Schmittel, a mining engineer with considerable experience in the profession.

Clemmer examined the claims in March 1995, and this culminated in a Mineral Report dated June 23, 1995 (1995 Report), and the recommendation to institute contest proceedings. Clemmer examined the claims again in 1998, when Schmittel conducted a drilling program on the claims on Bush's behalf. A Supplemental Mineral Report dated May 29, 1998 (Supplemental Report), was prepared by Clemmer. Jacquet oversaw Clemmer's work on both examinations, and co-authored both Reports. (Tr. at 43-44.) The 1995 Report and the Supplemental Report were admitted in evidence without objection as Government's Exs. C and D, 4/ respectively.

The 1995 Report discussed nine samples Clemmer took from backhoe pits. (Tr. at 27.) Assay results showed gold values from $0.001 per

4/ Contestee's exhibits are designated by numbers.

cubic yard to $0.870 per cubic yard for the nine pit samples. As part of his economic evaluation, Clemmer acknowledged that "[g]old placer resources on the Pamgold placer claims cannot be calculated with any degree of certainty due to a lack of exploration work. A rough estimate can be made based on information obtained during the field investigation." (Ex. C at 22-23.) Based in part on sampling conducted by Resource Trend U.S.A. Ltd. in 1993, an Australian enterprise that reportedly was interested in utilizing an innovative mining technique to mine Bush's claims, Clemmer concluded that bedrock became "progressively deeper from east to west," and "estimate[d] the average depth of gravel to be about 45 feet over the length of the claims." (Ex. C at 23.)

Clemmer developed a mining scenario based on Bush's statement that "he would strip off the top half of the gravel and dry wash the remaining material as ore down to bedrock," the particulars of which were set forth in the 1995 Report at 23-25. He concluded that the "total cost to excavate overburden and ore and the capital cost and operation of the wash plant and bulldozer are estimated to be $0.50 (rounded) per BCY [banked cubic yard] of gravel. These costs alone exceed the average value of gold found in the samples." (Ex. C at 24.) In reaching this conclusion, Clemmer omitted estimates of other costs, such as bonding, taxes, gold refining, permitting, contingencies, and general and administrative expenses, among other things, although he characterized them as "extensive." (Ex. C at 24.) These omissions arguably gave appellant the benefit of any doubt engendered by Clemmer's "rough estimate."

Bush did not object to any of these conclusions, the assumptions and facts on which they are based, or Clemmer's testimony regarding them. However, regarding Clemmer's 1995 sampling, Schmittel testified:

> MR. SCHMITTEL: That is a different case. His sampling -- his sampling was only in the very shallow top period. [sic]
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> * * * * * *
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> We went through almost three years of just being on ignore, essentially, by the Army to get permission to get in to finish this program. So three years later we come along and we do the drilling program so that he can get the deposit samples where we do have a chance. All of us think of placer gold. The gold samples you get with backhoe never show any values up there. It would be the rarest thing, kind of values up there [sic]. We proved that with the drilling. We found essentially nothing on the top. When we got near the bedrock, we got very high values. What those really came out to do was confirm there is a good value of placer gold down there. I don't know -- I don't have -- I have a couple of holes that showed a good value, couple sort of -- a couple with nothing, which is a real typical find. That is the first round.

(Tr. at 57-58.) While this testimony may constitute a criticism of the 1995 sampling method, it is not serious enough to defeat the Government's prima facie case. As Judge Hammett correctly noted, even assuming that the criticism is valid, "the Government's prima facie case is not overcome merely by Mr. Schmittel's critique of the Government's report and methods." (Decision at 6, Tab 9.)

Clemmer's Supplemental Report addressed the six holes drilled by Schmittel along three seismic lines, A, B, and C. 5/ Of the six drill samples, two (holes B-450 and C-430 on the Pamgold 8) showed gold values of $24.84 per cubic meter and $10.13 per cubic meter, respectively. None of the holes were cased, so that the samples obtained may have been compromised by cave-in material. Clemmer testified that uncased sampling is "not recommended as a best method for placer sampling." (Tr. at 22-23.) He further testified that the values determined for the six samples would not be an adequate basis for mine planning in the industry because more holes are needed to get a better idea of the nature and extent of any mineral deposit. Clemmer then described a step-out drilling program that would be necessary to properly ascertain the extent of gold values. (Tr. at 24.) Clemmer concluded that the extent of a gold-bearing deposit could not be determined on the basis of the gold values shown from six drill samples. (Tr. at 25.)

Neither Bush nor Schmittel directly challenged or questioned the two economic analyses or the assumptions and principles underlying them.

Regarding what the record shows, the 1995 Report stated that "[g]old placer resources on the Pamgold placer claims cannot be calculated with any degree of certainty due to a lack of exploration work. A rough estimate can be made based on information obtained during field investigation." (Ex. C at 22-23.) Clemmer therefore used the negligible gold values from the shallow backhoe pit samples to determine whether it would be economical to mine the deeper gravels, instead of using the higher gold values that were expected from the deeper gravels in performing the economic analysis. No such sample data were available in 1995, however, and it is the claimant's responsibility to expose the valuable mineral deposit, not the Government's. United States v. Alexander, 17 IBLA 421, 430 (1974).

When samples from the deeper gravels were obtained in 1998, Clemmer was able to attempt a "short economic analysis" for hole B-450, despite the obvious shortcomings of the drilling program, because it showed the highest value. He expressly cautioned that it is difficult to know how one hole may influence the ground. He nonetheless assumed 50 feet in each direction, or a 100-foot square around B-450 and calculated the reserves and average value for the bottom 10 feet to produce mining cost figures. He stated: "The costs are not complete. I didn't consider all the costs. But because of the little, the small quantity of reserves in

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5/ Clemmer reviewed the drill sampling results, serving as a "quality control observer" while the samples were obtained. (Decision at 6, n. 4, Tab 9, citing Ex. D at 1 and Tr. at 57.)

that small hundred-foot square an [sic] area, the cost to mining that would be very high." (Tr. at 26.) Clemmer discounted Trend Resource's conclusion that the claims contain 6,000,000 cubic meters of inferred resources. He did so because Trend Resource's conclusion was based on three dump samples and the assumption that the gold came from bedrock, when, with respect to dump samples, it is impossible to know where the gold actually came from. (Tr. at 30.)

We thus agree with Judge Hammett's observation that "Mr. Schmittel's drill sampling program yielded more data about the claim sites [footnote omitted], but the data remains inconclusive about whether sufficient quantities of gold are present to validate a discovery." (Decision at 6, Tab 9.) Among other things, the judge relied upon Schmittel's testimony:

> I agree with everything Clem [Clemmer] said on the thing.
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> * * * * * *
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> We went with open holes because when we could get it drilled there, do that kind of drilling within our budget and in the particular time period that the Army had given to us to do it. We took the worst piece of equipment to do as much as we could do.
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> Agree with everything he said. Yes, it is not good, but we got some information. We know there is contamination. * * * You are trying to take a sample from each interval where you are going down. * * * So as you get down to the bottom where you get our values, you are getting garbage off the top falling down to it. It almost invariably reduces the value of the gold you find. * * * We got -- all of the high gold values in our drilling were obtained at the bedrock content or very close to it.
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> If we had two or three additional rounds to go in and do more drilling and spread out exactly what Mr. Clemmer was suggesting, that should be done. Then we would be able to take it out into a proven resource category. Right now he is right; it is a possible reserve. And, yeah, you have to do a fifty-foot square, something like that, to calculate anything. I didn't put a cost calculation into this because there is no basis to it.
>
> (Tr. at 56-57, 58-59.)

(Decision at 6, Tab 9.)

Thus, any deficiency in the 1995 economic analysis was cured by the Supplemental Report. Moreover, contestee's expert agreed that further

drilling was needed to confirm or disprove the existence of a discovery, and he admitted that a discovery had not been shown, admissions Bush did not challenge. In these circumstances, the record clearly supports the finding that the Government presented a prima facie case 6/ which appellant failed to overcome.

The remaining issue concerns the Army's alleged denial of access to the claims. Schmittel was retained by appellant in August 1995, and was given access to the claims in late November 1995 to do preliminary surveying (Tr. at 54) and in early December 1995 to do the seismic program (Tr. at 5). The report on the seismic work was received by Bush and Schmittel in April 1996. (Tr. at 55.) Schmittel testified that he immediately submitted a proposal for the drilling, and it took two years to obtain permission from the Army. He stated his understanding that "the real problem with these claims came about when the Army forbade Mr. Bush access to the claims there, and was in '86, I believe." (Tr. at 53.)

Further testimony regarding the access question was given. Schmittel testified that he was personally acquainted with Resource Trend and its gold separation process:

> I know from ongoing personal contact with those people [that] they still would like to be mining that thing even though their report is not put together in the best format or anything. They do know what they are doing. They have some very innovative equipment and I believe that they would have had they been able to go into an agreement with Mr. Bush in '93, when they wanted to. They would have been mining over there right now. My understanding was that the Army prevented their going into the project. [Emphasis added.]

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6/ Nor do we perceive a fatal inconsistency in Clemmer's testimony regarding gold distribution on the Pamgold claims. The Supplemental Report at 26 expressly acknowledges the limitations imposed by the lack of exploratory work. Only three holes were drilled on line A, one on line B, and two on line C. Hole A-240 showed a gold value of $2.08 cubic yards (cy) at the 95 to 105-foot sample interval, and all other values were insignificant. Of the two holes on line C, C-230 showed insignificant values, and the other, C-430, located 400 feet northwest of C-230, showed $6.45 cy at the 85 to 90-foot interval. The strongest values were at different intervals in B-450. Clemmer's statement regarding the apparent gold distribution is nothing more than a surmise that he conceded could not be substantiated on the basis of the drilling information in hand.

We similarly are not persuaded that this Board should question the identification of samples and assays. The Government is under no obligation to impeach its own witness or otherwise impugn its case, and neither Bush nor Schmittel directly or indirectly questioned the assay results or the way they were reported in Table 1.

(Tr. at 53.) The witness explained the two-year period as "just stupid, silly delays on the thing." (Tr. at 56.)

Schmittel next testified:

> And when we were finally allowed in, it was a very short window period. We had also a limited budget, so we had to be a little bit clearer and get as much information as we could in one cheap shot. So, we made a lot of give-and-take decisions: how little information – how little work we could do, how little time we could spend, how little money could we spend and get the most information out of this. That is the way the [drilling] program was designed; the way it is.
>
> I agree with everything Clem [Clemmer] said on the thing Case holes were –
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> * * * * * *
>
> We went with open holes because when we could get it drilled there, do that kind of drilling within our budget and in the particular time period that the Army had given to us to do it. We took the worst piece of equipment to do as much as we could do.

(Tr. at 56.)

Schmittel explained that hole C-430 was not drilled at the optimum seismic point, yet returned a value of $10.13 per cubic meter. When Judge Hammett inquired why the hole had not been drilled at the optimum point, the colloquy was as follows:

> MR. SCHMITTEL: Surface access. We couldn't get the drill in without tearing up the thing.
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> ALJ HAMMETT: They selected the next best alternative.
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> MR. BUSH: Was as close as we could get to it, but a hundred feet from what would be optimum.

(Tr. at 67.) There was no further testimony on this point.

In connection with drilling on the A seismic line, Schmittel testified as follows:

> MR. SCHMITTEL: On C-230 we found no significant concentration of gold. And the A line was significant, but except for one possible, I wouldn't say, really economical thing, but we found a different bedrock there.

It was a soft clay-type bedrock which is not conducive to the concentration of placer gold like the granitic-type bedrock at the two other holes.

ALJ HAMMETT: Go ahead. What was your determination as far as the drilling on the A line, then?

MR. SCHMITTEL: Again, that we would need to determine the contact, where the bedrock changes from the hard-type to a soft material, and stick with the hard-type bedrock on the location of commercial deposits.

Then we would need to do exactly what Mr. Clemmer suggested earlier, go with the better type of drilling system and closer spaced holes to start proving. The resource right now indicated reserve with some real good numbers. But zero extension out on it. Again, we can't get into it. We had a very limited window by the Army. They said, "No more in there." We could not expand our program.

(Tr. at 68.)

Schmittel's direct testimony ended with the following exchange:

ALJ HAMMETT: So, as I understand your testimony, again I don't want to confuse the record, that applying the prudent man test, is it your opinion that that would be applicable to all three of those, to drill on all of those lines?

MR. SCHMITTEL: Yes. The reason we can't get in a specific economic analysis as Mr. Clemmer was doing, he proved it, even if we have a hole that we can't mine. One hole, that doesn't prove anything. It indicates it has to be expanded out in that. Without access, we can't do that.

(Tr. at 74.)

In the decision, Judge Hammett ruled as follows:

> This forum is aware of the holding that "[a]n administrative law judge is precluded from declaring a mining claim void for lack of a discovery when it is shown that the Government prevented the claimant from entering their(sic) claim to gather the information necessary to prove the existence of a discovery." United States v. Arthur Mavros, 122 IBLA 297, 310 (1992), citing United States v. Parker, 91 I.D. 271, 294 (1984); United States v. Pool, 78 IBLA 215, 225 (1984). However, neither Mr. Bush nor Mr. Schmittel, provided specific information on this issue other than to generally assert that the Army had provided a limited window of opportunity

> for their activities. In particular, the record does not indicate how much additional time, if any, Mr. Bush would have required but was refused by the Army, or indeed whether such additional time would have made a difference in the drill exploration program developed by Mr. Schmittel and the results which may have been obtained. These uncertainties are further magnified by the fact that Mr. Schmittel also identified limited financial resources as an additional factor which affected the design of the sampling program. (Ex. F, p. 4). The record does indicate, however, that the Army apparently provided access to Mr. Bush on four occasions, of which Mr. Bush availed himself only once. (Letter of George Moehlenhof, Attorney-Advisor, Hawthorne Army Depot, dated September 24, 1997). Accordingly, I find that Mr. Bush has not demonstrated that the Government unduly prevented him from entering the claim to gather information necessary to prove the existence of a discovery.

(Decision at 6-7, Tab 9.) Judge Hammett had the opportunity to assess the witnesses' demeanor and credibility, as well as the testimony and evidence of record. We find no reason to reverse his findings of fact or conclusions regarding the adequacy of the access afforded appellant.

Last, we are compelled to comment briefly on our colleague's contentions regarding the chain of custody of the samples and whether such assertions furnish a reason for finding that the Government failed to present a prima facie case. While defects in chain of custody of samples could, as an abstract matter, furnish a successful defense in a mining contest, that patently is not the case before us. No such allegation was made or suggested by appellant or his witness, 7/ and none appears from the record. We therefore see no proper reason for this Board to decide that an issue is raised ipso facto merely because the samples were stored in a facility operated by an adverse party. In the absence of even a hint of irregularity in the handling of the samples in this case, injecting the "issue" is justified only if this Board intends to establish the obligation to affirmatively prove chain of custody as an element of the Government's prima facie case. Manifestly, that is a burden of proof we should not and do not impose on BLM.

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7/ It should be noted, moreover, that Bush submitted a proposed agreement governing his access to his claims in Apr. 1997. Although the Army apparently did not execute it, among other things, paragraph 4 of that agreement provided: "Drill cutting samples shall be collected and sealed by Schmittel or his employees and turned over to the Army for transport to and storage at the Base. It is understood by the parties that the Army shall provide a heated indoor site at the Base for sample storage and processing (concentrating)." (Vol. 1 of administrative record, Tab 6.) Thus, the drilling samples apparently were handled in the manner Bush had envisioned and intended.

We end with the conclusion of Judge Hammett's decision:

> It is apparent from Mr. Bush's filings with this forum as well as his testimony at hearing that he most strongly believes that he has "discovered" gold on the subject claims. This forum does not disparage Mr. Bush's beliefs in this regard, for indeed it is undisputed that there is gold present on Mr. Bush's claims. But personal beliefs, no matter how strongly held, cannot serve as a substitute for evidence. And the evidence in this case simply does not support the conclusion that *enough* gold has been found such that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.
>
> It may well be that further exploration would yield data that would satisfy the legal standard; then again, further exploration could confirm that there are insufficient quantities of gold to develop a valuable mine. At present, however, all of the mining experts (Messrs. Clemmer, Jacquet, Schmittel, and Sullivan [8/]) who have looked at the data in this case, are in agreement that there is enough uncertainty about the quantity of gold present that the commencement of mining operations is not warranted without further exploration and study. As the Board has affirmed in United States v. Woolsey, 13 IBLA 120, 123-24 (1973):
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> > [P]roof that further exploration may be justified is not proof of a discovery of a valuable mineral deposit. What is necessary is proof that a prudent man would be justified in beginning actual development of the property with a reasonable prospect of success in developing a paying mine, Converse v. Udall, [399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969)]; United States v. Kelty, [11 IBLA 38 (1973)]; United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971). [Emphasis in original.]

(Decision at 10, Tab 9.) Judge Hammett's decision is affirmed.

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8/ Kevin Sullivan is credited with having prepared the report "Bulk Alluvial Sampling at the Pamlico Placer Prospect" for Resource Trend. (Ex. E.)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is adopted as the decision of this Board and is affirmed.

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T. Britt Price
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge

UNITED STATES OF AMERICA, Contestant,	)	
	)	Docket No. N-600-80
E.	)	Mining Claim Contest
KENT BUSH, BARBARA C. BUSH, H.R. EDDY, J.M. REYNOLDS, EVERETT LOVING, and ABBIE JEAN BUSH JONES	)	DECISION
Contestees.	)	

INTRODUCTION

The case before this forum had its genesis in a lawsuit filed by Mr. Kent Bush in the United States Court of Federal Claims on June 10, 1992, wherein he alleged that the U.S. Army had deprived him of his property rights in certain mining claims by refusing to allow him access to such claims occurring within the boundaries of Hawthorne Army Depot, in violation of the Fifth Amendment of the U.S. Constitution. Preliminarily, however, the Court of Federal Claims determined that the Department of Interior had not yet examined the issue of whether Mr. Bush had a sufficient property interest in the subject claims and thus stayed proceedings in Mr. Bush's awsuit in order that the Department might perform a validity determination on Mr. Bush's mining claims.

The Bureau of Land Management (BLM) on behalf of the United States Government, challenged the validity of several mining claims held by the Contestees by issuing a contest complaint on October 26, 1995. The contest complaint was served on Kent Bush, Barbara C. Bush, H.R. Eddy, J.M. Reynolds, Everett Loving and Abbie Jean Bush Jones. Kent Bush was the only individual to respond within the 30 day period provided for by 43 CFR § 4.450-6, and was the only named contestee who availed himself of an evidentiary hearing before this forum.

The complaint contests the validity of four gold placer claims, Pamgold Nos. 1, 8, 12, and 15, and three gold lode claims, Rocky Top Nos. 5, 7, and 8. These claims are situated in sections 13, 14, and 24 of T. 7N., R. 31 E., Mount Diablo Meridian, in the Pamlico and Never Sweat Canyons, Mineral County, Nevada. All of the Rocky Top lode claims, as well as placer

claim Pamgold 8, are wholly within the boundaries of the Hawthorne Army Depot. Parts of Pamgold Nos. 1, 12, and 15, are within the boundaries of the Depot. All remaining parts are on public land managed by BLM.

A hearing was held in this matter at Sacramento, California, on May 13, 1999. At the outset, the Government and Mr. Bush stipulated that there was a lack of discovery of a valuable mineral deposit on lode claims Rocky Top Nos. 5, 7, and 8 and placer claim Pamgold, No. 1. Since no other purported contestee challenged the Government's contest of these claims and since Mr. Bush stipulated as to a lack of discovery on them, and based on the unrefuted mineral examiner's report dated June 23, 1995 (Exh. C), I find, and so determine, that mining claims Rocky Top Nos. 5, 7, and 8, and Pamgold No. 1 are null and void because of a lack of discovery of a valuable mineral deposit on them. Accordingly, the hearing was, and this decision is, centered on addressing the validity of the remaining claims, i.e., Pamgold Nos. 8, 12, and 15.

DISCUSSION

The central issue in this case is whether Mr. Bush has a valid mining claim regarding Pamgold Nos. 8, 12, and 15. "A mining claim is valid only if it is supported by a discovery of a valuable mineral deposit. A discovery exists 'where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.' Castle v. Womble, [19 L.D. 455, 457 (1894)]. This test has been refined to require a showing of marketability, that a claimant has a reasonable expectation that the mineral could be extracted, removed, and marketed at a profit. United States v. Coleman, [390 U.S. 599, (1968)]." United States v. Aiken Builders Products, 149 IBLA 267, 278 (1999).

In a mining contest claim, the Government bears the initial burden of establishing a prima facie case that a discovery of a valuable mineral deposit has not been made. Once the Government's prima facie case has been established, the burden then shifts to the claimant to prove by a preponderance of the evidence that he has discovered a valuable mineral deposit. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); United States v. Husman, 81 IBLA 271, 275 (1984).

A. Government's Prima Facie Case

The Government called two witnesses at hearing, Mr. Luther Clemmer, and Mr. Daniel L. Jacquet. Mr. Clemmer is a consulting mining engineer who assisted BLM in the production of the two mineral reports which addressed the validity of Mr. Bush's claims. (Tr. pp. 9-12; Exhs. C and D) Mr. Clemmer has an extensive background examining the validity of mining claims as a former BLM employee, and as a mining consultant since his retirement from Government service in 1980. (Tr. pp. 9-12; Exh. A) In March 1995, Mr. Clemmer conducted fieldwork to investigate Mr. Bush's claims by digging eight pits seven to nine feet deep, and taking channel samples down the sides of those pits. Samples were screened for materials less than a quarter inch and bagged, labeled and secured for processing. (Tr. p. 15; Exh. C, p. 13) A

sample was also taken at the site of an old shaft on Pamgold No. 8, at Mr. Bush's request. 1/ (Tr. p. 16) Assays conducted on the samples indicated gold mineralization. The gold values for the relevant samples taken are reflected in the July 23, 1995 Mineral Report as follows:

Sample Number	Mg Gold	cu. ft of Sample	Value$/cu. yd	
Pamgold 8-1	0.004	2	0.001	
Pamgold 8-2	0.047	2	0.006	
Pamgold D (dump)	6.535	2	0.870	
Pamgold 12-1	0.000	2	0.000	
Pamgold 12-2	0.242	2	0.013	
Pamgold 15-1	1.823	2	0.243	
Pamgold 15-2	0.060	2	0.008	(Exh. C, p. 18)

Mr. Clemmer testified that the extent of the gold-bearing deposit could not be determined from the data that resulted from his sampling efforts, but nevertheless assumed that the gold bearing deposit was the entire claim area of Pamgold Nos. 1, 8, 12 and 15, consisting of approximately 220 acres. 2/ Using these parameters, Mr. Clemmer conducted an economic analysis of the mining feasibility of Mr. Bush's claims based on the average value of gold found in the placer samples. Mr. Clemmer concluded that the cost of mining the gold would far exceed the value of the gold. (Tr. pp. 17, 19-20, Exh. C, pp. 18, 22-27)

The Government next called Mr. Daniel Jacquet, a certified mineral examiner and professional geologist who has been working for BLM for over 20 years, and who has performed many mineral examinations throughout his career. (Tr. pp. 40-41; Exh. G) Mr. Jacquet testified that he independently assessed the analysis and conclusions reflected in the July 23, 1995 Mineral Report, and was responsible for co-authoring it. (Tr. p. 43) Mr. Jacquet opined that after reviewing all of the data collected concerning Pamgold Nos. 8, 12, and 15, there was no discovery of a valuable mineral deposit on any of these claims.3/ (Tr. p. 44)

1/ Mr. Clemmer testified that it is "not common practice to use dump samples to determine the value of a resource, because you do not know where the gold, for instance, came from in these claims. It's on the dump. You don't know where it came from. It probably came out of the shaft, but you are not sure of it." (Tr. p. 30)

2/ Mr. Clemmer assumed the mineable reserve consisted of essentially the entire claim site because Mr. Bush indicated that the mining plan entailed stripping off the top half of gravel and processing the bottom half of the material to bedrock. (Tr. p. 20).

3/ Before Mr. Jacquet provided his opinion, Government counsel specifically articulated the sense in which the word "discovery" was being used; i.e., in the sense of, and consistent with, the "prudent person" test. (Tr. pp. 43-44)

After the Government's questioning of Messrs. Clemmer and Jacquet, Mr. Bush did not cross-examine them. A prima facie case is established "[w]hen a Government examiner, who has sufficient training and experience to qualify as an expert witness, testifies that he has physically examined a claim and found mineral values insufficient to indicate the discovery of a valuable mineral deposit..." United States v. Gillette, 104 IBLA 269, 274 (1988)(citation omitted). Accordingly, I find that the Government successfully established a prima facie case that Pamgold Nos. 8, 12, and 15 are invalid mining claims.

B. Mr. Bush's Position

At hearing Mr. Bush relied on his own testimony and that of Mr. Richard Schmittel. Mr. Schmittel was retained by Mr. Bush to assist in determining the validity of Pamgold Nos. 8, 12, and 15. Mr. Schmittel established that he has an extensive mining background, graduating from the Colorado School of Mines as a mining engineer in 1967. He has worked overseas and in the United States in various capacities as a mining plant manager and as a technical consultant. (Tr. pp. 50-52)

Mr. Schmittel conducted an evaluation of the subject claims in three phases–performing a topographic survey, performing a reflection seismic survey to profile bedrock contact, and conducting a drill sampling program to determine mineralization. (Exh. F, p. 1) Mr. Schmittel prepared a written report for Mr. Bush detailing the methods used in performing this evaluation, as well as his conclusions concerning the data he obtained. (Exh. F)

Mr. Schmittel's evaluation program was constrained both in terms of time and limited financial resources. (Tr. p. 56; Exh. F, p. 4) Accordingly, several locations were identified for drilling using a less than optimum method for obtaining samples at depth. (Tr. p.57; Exh. F, p. 4) Mr. Schmittel indicated that "subeconomic" gold values were obtained for drill holes located on Pamgold 15. (Tr. p. 60) High gold values were obtained in drill holes B-450 ($24.84 per cubic meter, located on the boundary between Pamgold Nos. 8 and 12) and C-430 ($10.13 per cubic meter, located on Pamgold 8). (Tr. pp. 61, 67, 80) Another drill hole, A-240, yielded a value of $3.09 per cubic meter, which Mr. Schmittel characterized as being "very close" to being economical to mine. (Tr. pp. 70-71; Exh. F, Drill Data Summary) In his report, Mr. Schmittel asserted that:

> There is no question that Hole B450 intersected economic mineralization sufficient to validate both claims [Pamgold Nos. 8 and 12] under the currently applied requirements of the Mining Law of 1872. (Exh. F, p. 8)

In his evaluation of Mr. Bush's claims, Mr. Schmittel also reviewed the findings contained in a report prepared in 1993 by Resource Trend USA. (Tr. pp. 53-54; Exh. F, pp. 8-9; Exh. E). That report indicated an "inferred resource of 6,000,000 [cubic meters] at a recovered grade of 0.232g/[cubic meter]." (Exh. F, p. 9) Mr. Schmittel also indicated that if for any reason Mr. Bush's claims were invalidated, he would advise his client to restake the property and restart the process; "I feel that there is an excellent possibility of locating a commercial gold deposit...in the area specifically where the old B-450 is." (Tr. p. 80)

It was not clear from Mr. Bush's testimony what specific mining knowledge and experience he had. He mentioned two years of mining engineering, continuing with a major in math. (Tr. pp. 84-85) He also spoke of three full summers backpacking in the Sierra Nevada, and "working with geology." (Tr. p. 85) Mr. Bush stated that it hurt him personally the manner in which the Government's survey concluded that there was no gold. (Tr. p. 91) Mr. Bush apparently claimed to have more gold in his property than what the Government survey reflected, but offered no specific evidence in this regard other than the following assertion:

> I took my truck and would drive it into a young man who had a little plant. He had a jig and table, and he produced lots of gold out of the tops of those claims. That is as far as I went. Now, he stole the gold. He disappeared. He had enough of it. He was ready to go. You see, this is the business. (Tr. p. 91)

C. Post-Hearing Issues

The parties were requested to submit post-hearing briefs. Normally, post-hearing briefs are limited to a discussion of evidence already received, and submission of proposed findings of fact and conclusions of law. I was perhaps not as clear as I could have been to Mr. Bush in explaining the purpose of the post-hearing briefs insofar as Mr. Bush included additional matters of a factual nature in his submission. (Tr. p. 110, Bush PH Brief) Absent proper foundation and cross-examination, these materials are of questionable probative value. But in light of Mr. Bush's pro se status and Government counsel's cogent arguments concerning these additional materials, I find that no prejudice would inure to the Government's case by allowing these materials in. Accordingly, I have in my discretion allowed these materials to be considered as part of the administrative record in this case.

ANALYSIS

After reviewing the transcript and all documentary evidence forming the administrative record in this case, and for the reasons set forth below, I have determined that Mr. Bush has failed to establish by a preponderance of the evidence that he has discovered a valuable mineral deposit on Pamgold Nos. 8, 12 and 15. Specifically, he has failed to show that there are sufficient quantities of gold on each of these claims such that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

There is no question that there is gold present on the subject claims. The Government's validity examination summarized in its report of June 23, 1995, Mr. Schmittel's summary of the results of his drill sampling efforts dated April 16, 1998, and information developed by Resource Trend USA Ltd.–all confirm the existence of gold on the subject claims. The question remains, however, whether there are sufficient quantities of gold to validate a discovery under the prudent person and marketability standards.

The BLM mineral examiner's report indicated that the Government only went down seven to nine feet below the surface to obtain its samples. (Exh. C, p. 13) Mr. Schmittel was

critical of this methodology, asserting that it was necessary to take samples closer to bedrock in order to obtain a more accurate assessment of the amount of gold present. (Tr. p. 58; Exh. F, p. 2) Assuming arguendo that Mr. Schmittel's criticism of the Government's methodology is valid, the Government's prima facie case is not overcome merely by Mr. Schmittel's critique of the Government's report and methods. Mr. Bush bears the ultimate burden of persuasion and therefore must affirmatively establish the validity of his claims.

Mr. Schmittel's drill sampling program yielded more data about the claim sites, 4/ but the data remains inconclusive about whether sufficient quantities of gold are present to validate a discovery. Notwithstanding the fact that one of the drill holes, B-450, yielded particularly good gold values, Mr. Clemmer performed an additional economic analysis for this particular hole and concluded that "a loss of $56.53 would be incurred for each BCY [bank cubic yard] of ore mined. (Exh. D, pp. 23-27) Mr. Clemmer also concluded that it was not possible based on the values returned for the various drill holes to conduct mine planning in the industry–"Unless you drilled more holes, get a better idea of really what you had. The holes were spaced pretty far apart. We should have closer spacing to have more reliable results." (Tr. pp. 23-24)

Mr. Schmittel did not dispute Mr. Clemmer's interpretation of the drill sampling data's limitations–

> I agree with everything Clem [Mr. Clemmer] said on the thing...We went with open holes because when we could get it drilled there, do that kind of drilling within our budget and in the particular time period that the Army had given to us to do it. We took the worst piece of equipment to do as much as we could do. Agree with everything he said. Yes, it is not good, but we got some information... If we had two or three additional rounds to go in and do more drilling and spread out exactly what Mr. Clemmer was suggesting, that should be done. Then we would be able to take it out into a proven resource category. Right now he is right; it is a possible reserve...I didn't put a cost calculation into this because there is no basis to it. (Tr. pp. 56-57; 58-59)

This forum is aware of the holding that "[a]n administrative law judge is precluded from declaring a mining claim void for lack of a discovery when it is shown that the Government prevented the claimant from entering their (sic) claim to gather the information necessary to prove the existence of a discovery." United States v. Arthur Mavros, 122 IBLA 297, 310 (1992), citing United States v. Parker, 91 I.D. 271, 294 (1984); United States v. Pool, 78 IBLA 215, 225 (1984). However, neither Mr. Bush nor Mr. Schmittel, provided specific information on this issue other than to generally assert that the Army had provided a limited window of opportunity for their activities. In particular, the record does not indicate how much additional time, if any,

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4/ The drill sampling program results were reviewed by Mr. Clemmer, who served as a quality control observer while samples were being obtained. (Exh. D, p. 1; Tr. P. 57) Mr. Clemmer thereafter issued a supplemental mineral examiner's report dated May 29, 1998 assessing the data uncovered by the drill sampling effort. (Exh. D)

Mr. Bush would have required but was refused by the Army, or indeed whether such additional time would have made a difference in the drill exploration program developed by Mr. Schmittel and the results which may have been obtained. These uncertainties are further magnified by the fact that Mr. Schmittel also identified limited financial resources as an additional factor which affected the design of the sampling program. (Exh. F, p. 4) The record does indicate, however, that the Army apparently provided access to Mr. Bush on four occasions, of which Mr. Bush availed himself only once. (Letter of George Moehlenhof, Attorney-Advisor, Hawthorne Army Depot, dated September 24, 1997). Accordingly, I find that Mr. Bush has not demonstrated that the Government unduly prevented him from entering the claim to gather information necessary to prove the existence of a discovery.

Both Mr. Clemmer and Mr. Schmittel are in agreement that there is enough gold to warrant further exploration. Mr. Clemmer asserts, however, that the data does not yet support the conclusion that a discovery has been made. Mr. Schmittel opined that "Did we find anything that a prudent man would keep *exploring* from? Yes, we did. We have two real hot holes there. These are the B-450...and the C-430." (Emphasis added) (Tr. p. 59)

As has been discussed in Board precedent:

> There is a clear distinction between the quantum of evidence which would be sufficient to justify a prudent individual in the continuation of an active search for a mineral deposit of sufficient quantity and value to warrant development and that evidence which is, itself, adequate to justify the commencement of actual development of a productive mine with a reasonable prospect of success. Only the latter showing is sufficient to warrant a finding that a discovery under the mining laws exist. (Citations omitted, United States v. Bill Boucher, Linda Joiner Drohman, 147 IBLA 236, 240 (1999)).

Stated in slightly different terms,

> There is a clear distinction between "exploration" and "development" as they relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work includes such activities as geophysical or geochemical prospecting, diamond drilling, sinking an exploratory shaft or driving an exploratory adit. It is that work which is done prior to a discovery in an effort to determine whether the land is valuable for minerals. When inherently valuable minerals are found, it is often necessary to do further exploratory work to determine whether a valuable mineral deposit exists, i.e., whether the minerals exist in such quality and quantity that there is a reasonable prospect of developing a paying mine. United States v. Lundy, A-30724 at 5 (June 30, 1967). This does not mean that all diamond drilling, shaft sinking, adit driving, or similar work must always be classified as exploration. If there is "a qualifying discovery of mineral of mineable quality and

quantity; i.e., 'ore,' the 'blocking out' and mapping of the body by drilling and geophysical analysis may properly be regarded as 'development.' (Citations omitted) Yankee Gulch Joint Venture et. al. v. BLM, 113 IBLA 106, 131-132, (1990).

To clarify Mr. Schmittel's testimony regarding the interpretation of the drill sampling program, Government's counsel specifically questioned Mr. Schmittel about the prudent person test.

Q. Let me ask you a few questions about your understanding of the requirements to mining law to show a valid mining claim...do you have a good knowledge of what the requirements are?
A. When I was taught mining law, it was prudent man. That was enough. I know more added things than that. That was 1967.
Q. In your understanding, what does a prudent man need to do in order to establish a valid mining claim? Is it a prudent man to explore or prudent man would spend money to?
A. Spend money with expectation of eventually earning a profit.
Q. Does that go beyond explore, to develop a mine.
A. You can't make money exploring.
Q. Your understanding is that a prudent man has to come to the conclusion that it is worthwhile to develop the mine?
A. That's correct.
Q. Mere exploration is not enough?
A. Doesn't get it. Well, he starts out with a first find. Then he has to spend some more money for additional exploration until he proves a deposit. Then goes ahead. Prudent approach. I think that is what we have here, is that first find. But we don't have access to go finish the next phases of it.
Q. Do you agree with Mr. Clemmer's testimony that you just have no idea of what the extent of the gold bearing deposit is?
A. I do. (Tr. pp. 77-78)

In describing a recommended program for additional drilling, Mr. Schmittel stated the following in his April 16, 1998 report to Mr. Bush:

If this program is to be continued fully to evaluate the reserve, I recommend a staged approach. Each stage would be dependent on the results of the prior phase... As the above outlined program is in progress, the results will be continuously charted and reviewed. If results are consistently of commercial grade, the hole spacing may be extended. If low value areas are encountered, the hole spacing may have to be reduced to identify areas of low value. When a sufficient amount of reserves have (sic) been proven to justify a bulk mining program, the drilling program may be discontinued in favor of that more cost effective and profitable approach. (Emphasis added.) (Exh. F, pp. 9-10)

And later in the hearing, Government's counsel elicited the following from Mr. Schmittel:

Q. Assume you can get access [to Mr. Bush's mining claim sites], what would you do? What would your next step be?
A. Expand on that same gold that was found.
Q. By drilling more holes?
A. Yes.
Q. Would you bring a backhoe and actually start placer operations?
A. Not til I prove more. (Tr. p. 83)

Although Mr. Schmittel opined that Mr. Bush's claims are "very valid," (Tr. p. 81) his testimony and written declarations undermine such a conclusion. What is clear is that both Mr. Clemmer and Mr. Schmittel are in agreement that, based on the data developed thus far, further exploration is warranted before actual mining operations should commence. Accordingly, based on the data developed to date, I must conclude that there are insufficient quantities of gold present on Pamgold Nos. 8, 12 and 15 such that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

Mr. Bush has also argued that the willingness of Resource Trend, USA, to enter into a lease arrangement with him concerning his properties is evidence that the prudent person standard has been satisfied. (Bush PH Brief, p. 3) According to Mr. Schmittel, "Resource Trend was satisfied with their exploration to that date and were willing to initiate production operations based on that work. This fact alone should validate the claims." (Emphasis in original) (Bush PH Brief, Schmittel letter of 9/13/99, par. 8)

However, correspondence submitted by Mr. Bush from Resource Trend, does not lend credence to Mr. Schmittel's assertion that Resource Trend was ready to initiate production operations. In a letter dated October 18, 1993, to Mr. Bush, Resource Trend described a term of lease which included a six month "Feasibility and exploration period," during which time, Mr. Bush would have no right to receive royalty payments. (Bush PH Brief, Resource Trend letter) And in a letter dated January 7, 1994, to Mr. Bush, Resource Trend wrote concerning Mr. Bush's properties:

> Resource Trend wishes to inform you that the data obtained during this exploration is sufficient in content for further exploration to determine the properties (sic) potential....If access can be obtained through the Army ground holders, Resource Trend would be extremely interested in mining the ground after further exploration such as seismic, drilling, and sampling on the property was concluded. (Emphasis added)(Bush PH Brief, Resource Trend letter)

Based on the foregoing, it is clear that Resource Trend considered Mr. Bush's claims to have potential, but that further exploration and study was necessary to determine the feasibility of commencing mining operations. As has been discussed above, however, the circumstances justifying further exploration are not sufficient to satisfy the prudent person legal standard.

CONCLUSION

It is apparent from Mr. Bush's filings with this forum as well as his testimony at hearing that he most strongly believes he has "discovered" gold on the subject claims. This forum does not disparage Mr. Bush's beliefs in this regard, for indeed it is undisputed that there is gold present on Mr. Bush's claims. But personal beliefs no matter how strongly held, cannot serve as a substitute for evidence. And the evidence in this case simply does not support the conclusion that *enough* gold has been found such that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

It may well be that further exploration would yield data that would satisfy the legal standard; then again, further exploration could confirm that there are insufficient quantities of gold to develop a valuable mine. At present, however, all of the mining experts (Messrs. Clemmer, Jacquet, Schmittel, and Sullivan 5/) who have looked at the data in this case, are in agreement that there is enough uncertainty about the quantity of gold present that the commencement of mining operations is not warranted without further exploration and study. As the Board has affirmed in United States v. Woolsey, 13 IBLA 120, 123-24 (1973):

> [P]roof that further exploration may be justified is not proof of a discovery of a valuable mineral deposit. What is necessary is proof that a prudent man would be justified in beginning actual development of the property with a reasonable prospect of success in developing a paying mine. Converse v. Udall, [399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969)]; United States v. Kelty, [11 IBLA 38 (1973)]; United States v. New Mexico Mines, Inc., 3 IBLA 101 (1971). [Emphasis in original.]

Thus, on the record before me, I determine and so order that Pamgold Nos. 8, 12 and 15 claims are null and void for lack of a discovery of a valuable mineral deposit–gold.

APPEAL PROCEDURES

In staying its proceedings, the United States Court of Federal Claims did not indicate any intent that there should be any deviation from the standard administrative appellate process followed in mining cases. Therefore, this process is followed in this case. A copy of 43 CFR §§4.400-4.414 is attached and incorporated as a part of this decision. These regulations define the process which Mr. Bush must follow should he wish to appeal from this decision.

In particular, a person who wishes to appeal this decision to the Board of Land Appeals must file a notice that he wishes to appeal, in the office of the officer (not the Board) who made

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5/ Kevin Sullivan is identified as the mining consultant who prepared a report on "Bulk Alluvial Sampling at the Pamlico Placer Prospect," for Resource Trend, USA. (Exh. E)

the decision, within 30 days after such person was served with the decision. Accordingly, should Mr. Bush wish to appeal to the Board of Land Appeals, he must file a notice of appeal at the following address:

Office of Hearings and Appeals
Hearings Division
801 I Street, Room 406
Sacramento, California 95814

The notice of appeal must give the serial number or other identification of the case and may include a statement of reasons for the appeal and any arguments the appellant wishes to make.

No extension of time will be granted for filing the notice of appeal. If a notice of appeal is not timely filed, the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken.

The foregoing represents only a portion of the requirements contained in the regulations. Mr. Bush should refer to, and comply with, the attached regulations in their entirety to ensure that his appeal rights within the Department of Interior are not lost or otherwise prejudiced.

Dated and entered at Sacramento, California Jan 12 2001 .

WILLIAM E. HAMMETT
Administrative Law Judge

SEPARATE OPINION BY ADMINISTRATIVE JUDGE MULLEN:

Administrative Law Judge Hammett's decision on appeal was founded upon the testimony and opinion of expert witnesses. The lead opinion and I are in agreement regarding the eventual outcome of the contest. However, I am unwilling to ignore certain matters that weigh on the credibility of the documents, testimony, and conclusions of the expert witnesses.

The Secretary is entitled to rely on the reasoned analysis of its experts in matters within their realm of expertise. Sierra Club, Angeles Chapter, 156 IBLA 144 (1992); Legal and Safety Employer Research Inc., 154 IBLA 167 (2001); Navajo Refining Co., 149 IBLA 14, 20 (1999); West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998); Kings Meadow Ranches, 126 IBLA 339, 342 (1993). However, the Secretary and this Board have the right (and in my opinion, we have an obligation) to examine the evidence before us and determine whether that analysis is reasoned and defensible.

Equally important is the fact that this Board exercises the review authority of the Secretary of the Interior. 43 CFR 4.1. We are not a court and we are not limited to the issues raised by an appellant on appeal or during a hearing. We can examine and question any issue or evidence in the record, even though the evidence was not questioned or specifically objected to during the course of the hearing or on appeal. The fact that the appellant did not challenge evidence or raise an issue regarding a document or testimony during the course of a hearing does not preclude our looking into a document or raising an issue. If inconsistencies exist, we are not precluded from considering those inconsistencies by an appellant's failure to do so. This is not a new concept. The Board has noted a number of times that the review of a decision on appeal is not limited to the issues presented by the parties, but may include all relevant matters appearing in the record which are within the authority of the Department. Suzanne Walsh, 96 IBLA 374 (1987); Shiny Rock Mining Corp. (On Reconsideration), 77 IBLA 261, 262 (1983); United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983); United States v. Dunbar Stone Co., 56 IBLA 61, 67-68 (1981). Our ultimate and longstanding concern is whether the decision under appeal is supported by the record. See Antoine "Fats" Domino, 7 IBLA 375, 377 (1972).

In this separate opinion, I will highlight a number of inconsistencies and errors in the record. I cannot say that any one of them is so fatal that I would insist that the Government's case should be dismissed. What troubles me is the number of times that basic procedures were ignored, the number of times that there appears to be an error in the collection and/or analysis of the data, and the number of times that the opinion expressed by the Government's witness is either contradicted by the record or not supported by it.

These troubling details should have been noted and considered at the hearing. However, Bush appeared pro se and did not have the advice of someone knowledgeable about the fields of evidence or mining law, or

even about the basic reason why the hearing was being held. That was his choice, and Bush's failure to retain competent legal counsel is not a reason for overturning the decision. 1/ However, it also should be said that his failure to have competent legal representation is **not** a valid reason for ignoring the evidence in the record and the issues raised by that evidence.

This case arose some time in the early 1980's when the Bushes began trying to gain permission to go on that portion of their claims within the Hawthorn Army Depot (Depot) to conduct sampling and, if warranted, mining operations. (Ex. F at 1, Hammett Decision at 3.) After years of trying, and having their requests either ignored or denied, the Bushes initiated action in the U.S. Court of Claims on June 10, 1992, alleging that the Department of Defense had deprived them of their property interest in the claims. In 1994 the Department of Defense and the Justice Department asked BLM to examine the claims and determine whether a discovery existed. That is, this mining claim contest was initiated by BLM on behalf of the Department of Defense, making that Department a party adverse to the claimants.

The initial BLM examination of the claims

Luther S. Clemmer, a contract mineral examiner hired by BLM, conducted the preliminary field examination on November 22, 1994. Permission for access to the Depot lands was gained and the preliminary field investigation was conducted on December 13, 1994. During this one day

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1/ However, see United States v. Victor Material Co., 67 IBLA 274 (1982). In affirming the ALJ, the Board stated: "In conducting their proceedings administrative agencies have the duty to investigate all pertinent facts and to see that such facts are adduced when the parties themselves have failed to put them into the record. Isbrandtsen Co. v. United States, 96 F. Supp. 883, (S.D.N.Y. 1951), aff'd, 342 U.S. 950 (1952)." (67 IBLA at 276.) This duty has a special importance in proceedings involving pro se litigants. In United States v. McKenzie, 20 IBLA 38 (1975), the Board set aside an ALJ's decision in the case involving a pro se mining claimant and remanded the case for further hearing because the ALJ failed to make clear the status of certain evidence that the claimant had tendered. The Board stated:

"The Administrative Law Judge should have done more to clarify the status of the tendered evidence. An Administrative Law Judge is vested with general authority to conduct a hearing in an orderly and judicial manner. 43 CFR 4.452-4. He may call and question witnesses. Id. He may state issues upon which he may wish to have evidence presented. 43 CFR 4.452-5. He may admit documentary evidence if pertinent to any issue and may question any witness concerning relevant issues. 43 CFR 4.452-6. In short, he has a duty to conduct a hearing in such a manner that all available relevant facts in a hearing will be adduced. He should take special care to do so where a party is without counsel, and there is confusion concerning the status of the tendered evidence. See Stewart v. Cohen, 309 F. Supp. 949 (E.D. N.Y. 1970)." 20 IBLA at 44.

field investigation "claimant's representative was present." (June 23, 1995, Validity Examination Report (Ex. C) at 1.) No further activity took place until March 1995 because of unfavorable winter weather. Between March 20 and 28 three, and sometimes four, BLM employees took placer samples from trenches excavated by an operator and equipment supplied by the Army. The claimant was not present, and there is no evidence that the claimant was invited to attend the sampling. Id.

In Exhibit C, Clemmer describes the sampling conducted on the claims during the period from March 20 through 28, 1995. Nine samples were taken. Eight were vertical channel samples cut from the wall of eight 7 to 9 foot deep pits excavated using the Army backhoe. The eight channel samples were cut 1 foot wide and six inches into the wall of the pit. Each channel sample was cut to the full depth of the pit (7 to 9 feet). 2/ (Ex. C at 13.) The ninth sample was "a grab sample of unconsolidated alluvial material from the dump of an old vertical shaft * * *." (Ex. C, page 17.) No attempt was made to segregate any of the channel samples vertically to ascertain whether the gravels might vary in value with depth. The samples were measured, weighed and screened. The (-)1/4 inch fractions were bagged, labeled and "stored at the Army's maintenance equipment building on the Hawthorn Army Ammunition Plant Site. When the sampling was completed, these samples were processed by panning to obtain 'black sands' concentrate * * *." (Ex. C at 22.)

Chain of custody issue

To assure the admissibility of samples as evidence in administrative and judicial proceedings, a mineral examiner is required to retain custody of samples. The BLM Field Handbook for Mineral Examiners (H3890-1) states at IV-1 that:

> The mineral examiner has the responsibility for protecting samples from contamination or salting from the time of the sampling until the end of all administrative and legal proceedings, that is, maintaining a "chain of custody." Definite plans as to * * * secure storing of the samples * * * should be worked out in significant detail * * *. This is especially significant if the assay results are questioned later, or if the case ends up in litigation in the Federal Court.

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2/ There is no evidence that Clemmer made any attempt to sample at bedrock at any place on the claims. This failure has been excused by reference to the requirement that the claimant's expose the valuable mineral for the examiner. The mineral examination is a direct result of the legal action Bush initiated after being denied access to the claims for a number of years. Under the circumstances, I am hard pressed to fault Bush, who was not permitted to do any work on the claims, for not exposing bedrock for the mineral examiner, who had been given an Army backhoe and operator to assist in taking samples.

In United States v. Crowley, 124 IBLA 374, 381 (1992), the Board stated: "It is important that the 'custodial security' of samples taken from mining claims be maintained and, in the absence of assurances thereof in the record, the reliability of assay results is weakened."

Generally, when a proponent wishes to introduce a physical object into evidence, the proponent must produce evidence showing that the object has remained essentially unchanged. 29A Am Jur. 2d Evidence § 945. "As a general rule, if the proffered evidence is unique, readily identifiable and relatively resistant to change, the foundation need only consist of testimony by a witness with knowledge that the evidence is what the proponent claims." Id. A different rule applies to objects that are not readily identifiable and are susceptible to change, such as mineral samples:

> When the evidence is not readily identifiable or when a witness has failed to observe its uniqueness, and is susceptible to alteration by tampering or contamination, the trial court requires a foundation more stringent than in cases involving objects readily identifiable and resistant to change, entailing a chain of custody of the item with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with. [Footnotes omitted.]

Id. at § 946. With respect to mineral samples, the following observation is particularly important:

> In general, proof of the chain of custody is vital to the admissibility of evidence if its relevant characteristics are distinguishable only by scientific test or analyses. Proof of this identity involves showing that the thing was taken from the particular body from which it was supposed to be taken, and that thereafter it was properly kept and, if necessary, transported and delivered to the one who produced it at the trial or the expert who analyzed or examined it. If the "complete chain of evidence" is established, the substance is admissible; otherwise it is not admissible. [Emphasis added; footnotes omitted.]

Id.

The admissibility of assay reports must be based on a foundation that the samples themselves represent what deposits are on the claim; otherwise, they would not be relevant. A proper foundation for admitting assays into evidence may be established by testimony that the samples were taken and handled in accordance with established professional practices. See, e.g., United States v. Arbo, 70 IBLA 244, 250 (1983); United States v. Clemans, 45 IBLA 64, 70 (1980). When the samples have not been handled in accordance with those practices, a strong argument may be made that additional

evidence is necessary to establish the relevance of the assays. If evidence indicates that a chain of custody was not maintained, the assays should not be accepted.

The record demonstrates that following screening and bagging, the samples were surrendered to and stored in facilities under the direct control of the Army — a party with interests clearly adverse to those of the claimants.

First BLM economic evaluation

My next concerns are the geologic inferences assumed by the geologist employed by the BLM, and his economic evaluation.

The (-) 1/4 inch material was panned in the Army facilities and the resulting black sand concentrates were sent to an assay lab. The assay results showed values from $0.001 per cubic yard (PG 8-1) to $0.870 per cubic yard recovered from the dump sample (PG 8-D). Excluding the dump sample Clemmer estimated that the gravel contained gold values of $0.05 per cubic yard, based on an arithmetic average of the eight samples. (Ex. C at 18.) Clemmer stated that gravel "depth varies from 10 feet as reported in the Never Sweat Canyon to 85 feet as measured in an old shaft in Pamlico Canyon on Pamgold #8 claim." (Ex. C, page 10) Clemmer assumed the deposit covered the entire surface of the claims and estimated the average depth of the deposit to be about 45 feet.

Using a surface area of 220 acres or 1,064,800 square yards, and a depth of 15 yards, Clemmer calculated the volume of the gravel in place to be 15,972,000 bank cubic yards. 3/ No adjustment was made to convert the "loose cubic yard" assay value to the value of material in place, which was expressed in "bank cubic yards."

As noted previously, Clemmer testified that he took samples to a depth of 7 to 9 feet from the surface in a deposit that he estimated to be 45 feet deep. With no other explanation than "talking with Mr Bush he indicated that he had a plan for mining where he was stripping off the top half of the gravel and then process[ing] the bottom half of the material to bedrock." (Tr. at 20.) Clemmer used this mining method for his analysis of mining and processing the 15,972,000 bank cubic yards of mineral material. Said another way, Clemmer devised a mining plan that would discard all of the mineral material he sampled and process gravels of an

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3/ Clemmer used an arithmetic average, rather than attempting to ascertain an area of influence. The arithmetic average mineral value of the eight samples was assigned to 15,972,000 bank cubic yards of mineral material, or almost 2 million cubic yards per sample. The conclusion that must be reached from this projection is that Clemmer was willing to assume that the mineral deposit was very uniform in character throughout the entire 220 acres.

unknown value lying at least 13 feet below the bottom of his deepest sample. Unknown value, that is, unless it is assumed that the gold is uniformly distributed throughout the entire deposit.

That is not the only problem I have with this analysis. The prudent man test, set out in Castle v. Womble, 19 L.D. 455 (1894), is an objective test. The determination of validity cannot rest upon such subjective considerations, but only on objective criteria. United States v. Gardner, 18 IBLA 175, 179 (1974); United States v. Harper, 8 IBLA 357, 367 (1972); United States v. Stewart, 5 IBLA 39, 53, 79 I.D. 27, 34 (1972). When a mineral examiner substitutes the claimant's statement regarding how the deposit would be mined for his own professional judgement regarding the most prudent mining method, the mineral examiner is not applying the prudent man test objectively. Clemmer has applied a subjective test, based upon what Bush stated he might do. To justify using Bush's mining method, Clemmer must demonstrate that Bush was a prudent man. There is no evidence that he held that belief, and his recommendation in his mineral report that a contest be initiated speaks otherwise. The prudent man test was not applied when Clemmer did his economic evaluation.

The Mineral Report addressed above is not the only BLM mineral report prepared by Clemmer. Before addressing the second report Clemmer prepared, I will outline the events leading up to it.

Bush's attempt to gain evidence to support the defense of his claim

Based upon the results of Clemmer's mineral report, a mining claim contest was initiated on October 26, 1995. An answer was filed by Bush and his wife, who attached a copy of an August 28, 1995, letter to their answer. This letter had been written by Richard L. Schmittel, a consulting mining engineer employed by the Bushes, and was addressed to the counsel for the Depot commander. Schmittel's letter was a request for permission to conduct a three-phase program to facilitate his preliminary appraisal of the placer claims. Phase 1 was a topographical survey and mapping of the claims. Phase 2 was a limited geophysical survey intended to identify the depth and location of the auriferous gravels, and Phase 3 was a drilling program.

A response to Schmittel's request, dated October 17, 1995, was also attached to the Bush's answer. This letter outlines an agreement reached regarding the conduct of Phase 1 and Phase 2 of his preliminary appraisal of the claims. It was agreed that this work would be conducted in November, 1995, rather than December, as proposed by the Army ("to permit access during warmer weather"), and the Army approved using six persons, rather than five, counting BLM employees, but not counting the Army's representative. No permission was given for the Phase 3 drilling, and it was specifically stated that no permission would be granted "until after Schmittel has developed plans for its execution" (Oct. 17, 1995, Letter).

The Phase 1 topographical survey and mapping of the claims was conducted on November 24-25, 1995. The Phase 2 limited geophysical survey was conducted on December 6-8, 1995. Following completion of this survey, a geophysical report, dated April 1996 (Ex. 2) was prepared by the geophysical contractor hired by Bush to do that survey.

The Bushes then sought permission to do Phase 3, which was described in Schmittel's August 28, 1995 letter as

> a drilling program that will be based on the result of the seismic survey. I will therefore not be able to detail it until Phase 2 has been completed. I expect to be able to use approximately 6 inch diameter holes drilled with a cased reverse circulation rig. Holes will probably be spaced at approximately 50 foot centers. The casing will be pulled from each hole as soon as it has been completed. That should cause them to cave and close the hole. Some tractor work will probably be necessary to allow the drill truck to access the hole sites. Any surface damage will be reclaimed by grading the disturbed area as soon as the program has been completed.

(Aug. 28, 1995, Letter at 2.)

In his Phase 3 report, dated April 20, 1998, Schmittel describes what transpired following his August 28, 1995, request for permission to undertake an appraisal program:

> I sent letters to both Army and BLM personnel requesting permission to conduct such a program on August 28, 1995. I finally received permission to complete Phases 1 & 2 on October 31. The field work for Phase 1 was completed on November 24-25. Field work for Phase 2 was completed December 5-9, 1995. The topographic data covering both Phase 1 & 2 was provided to the seismic sub-contractor, Cooksley Geophysics, Inc. on December 18, 1995. Their final report, complete with cross-sections and maps was provided on April 8, 1996. Copies of that seismic report along with applications to proceed with Phase 3 were sent to the Army (both counsel and base commander) and BLM on April 9, 1996.
>
> Despite numerous telephone calls and letters no response was received from the Army for over one year. The Army finally granted permission to proceed with Phase 3 during late 1997. At that time I was working in South America and could not return to complete the project. That permission was extended and the project * * * was completed during March 1998.

(Ex. F at 3-4.)

After trying for almost two years to gain permission to do the drilling, permission was granted. Schmittel described this grant of permission to go on the Depot land as having a "very short window period." (Tr. at 56.)

The Phase 3 drilling program

Drilling began on March 16, 1998 and concluded with amalgamation testing on March 25, 1998. Six holes were drilled to bedrock using a 5-15/16 inch tri-cone bit with a direct circulation drill and air as a recovery medium. Some problems with losing circulation were encountered that required use of water to mud up the hole. 4/ Sampling commenced when the drill reached a depth of 20 feet and continued to bedrock. Each 5 foot interval was sampled separately. Id.

Again, the samples were collected and tagged by Clemmer. In his supplemental report, he states that "[i]t was [his] responsibility to secure all samples and concentrates until they could be processed. (Ex. D at 19.) 5/ Clemmer ran the samples through a portable wash plant at Depot facilities in the same manner as the samples taken during the prior examination. The heavy fraction of minus 1/4 inch material containing the black sands was recovered and taken to the laboratory for analysis. The contained gold was recovered by amalgamation and weighed. In all, 31 samples were assayed.

The Government's Supplemental Mineral Report

Clemmer and Daniel L. Jacquet, a BLM mineral examiner, actively participated in the Phase-3 program. Clemmer then prepared his supplemental mineral report, dated May 29, 1998. (1998 Supplemental Mineral Report, Ex. D.) The stated purpose of this Report was "to document, evaluate and determine whether the [Phase 3] drilling project by the claimants has discovered sufficient gold to validate the Pamgold Nos. 1, 8, 12, and 15 placer mining claims." (Ex. D, page 1.) Much of the report is nearly identical to the earlier report (Ex. C), including the description of the samples Clemmer took and his economic analysis using those samples. There are some important differences however. The 1998 report includes a description of the Phase 3 drill project and the results of the drilling. In the Supplemental Mineral Report Clemmer states that the depth to the bedrock "varies from 75 to 145 feet, as measured in drill holes on the claims." (Ex. D, page 8.)

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4/ Schmittel testified that because of the short notice given by the Army, the short time period allowed for drilling, and budgetary constraints, Bush was unable to obtain the equipment necessary to drill cased holes, and the holes were not cased. (Tr. 56)

5/ Once again, the samples were taken to and stored in the Army's maintenance equipment building on the Hawthorn Army Ammunition Plant Site. The discussion of the chain of custody above is applicable to these samples as well.

The assay results, as shown in Table 3, Table 4, and Attachment G of Clemmer's Supplemental Mineral Report are compiled in Table 1.

TABLE 1

ASSAY RESULTS FOR DRILL HOLES

Drill Hole	Sample Interval	Size Cubic Ft.	Assay Number	Value $/BCY
A-120	20'- 40'	3.56	1-19	0.45
	40'- 60'	2.74	1-11	0.02
	60'- 70'	0.81	1-23	0.07
	70'- 75'	0.68	1- 3	0.90
A-240	20'- 50'	4.63	1-21	0.19)?
	20'- 50'	4.63	2- 2	0.03)?
	50'- 85'	4.15	1-25	0.08
	85'- 95'	1.01	1-22	0.08
	95'-105'	0.89	1-24	2.08
A-440	20'- 50'	4.26	1- 1	0.69
	50'- 70'	NO REPORT OF ASSAY RESULTS		
	70'- 75'	0.97	1-10	0.08
	75'-105'	4.18	1- 4	0.24
	105'-135'	3.26	1- 2	0.04
	135'-140'	1.09	1-18	0.97
	140'-145'	0.55	1-16	0.23
B-450	20'- 50'	4.10	2- 3	0.04
	50'- 75'	3.94	2-24	0.22
	75'- 85'	0.89	2- 4	1.05
	85'- 90'	0.48	2-25	0.98
	90'- 95'	0.64	3- 2A	15.97
	95'-100'	0.81	3-19A	3.99
C-230	15'- 50'	NO REPORT OF ASSAY RESULTS		
	50'- 80'	4.43	2-23	0.05
	85'- 95'	0.48	2-22	0.43
	100'-105'	0.62	2-18	0.17
	105'-110'	0.62	2-16	0.35
	115'-120'	0.81	2-21	0.13
C-430	20'- 50'	5.23	2-11	0.15
	70'- 95'	3.46	3- 3A	0.04)?
	75'- 80'	0.32	2-10	nil)?
	80'- 95'	4.30	3- 1A	0.04)?
	85'- 90'	0.97	2- 1	6.45)?

No similar compilation can be found in Exhibit D. More important, when I compiled the data shown in Table, I found that separate assay

results were shown for the same samples. For example, sample 3-1A is for the 80' - 95' drill interval in drill hole C-430. Sample 2-1 is for the 85'-90' interval of the same drill hole. This indicates either two different results for the same sample or that the samples were incorrectly identified. Either reason raises a serious question regarding the reliability of the sampling and/or assay results. No explanation was given for this discrepancy, and there is no evidence that it was even noted.

Clemmer noted that two of the holes contained anomalous values. Hole C-430 indicated values of $6.45 at a depth from 85 to 90 feet. The highest gold values were found in Drill Hole C-450 which contained an arithmetic average of $5.50 in a 25 foot zone between the depths of 74 and 100 feet.

Clemmer then attempted to estimate the size of the mineral zone for this mineralization. For his estimates he chose two assays of mineral from Drill Hole C-450 covering the depth from 90 to 100 feet and having an arithmetic average value of $15.97. 6/ His first conclusion was that "[t]he area of influence to assign to this drill hole is impossible." (Ex. D at 26.) As an explanation of this conclusion, he notes that the

> [i]ndustry practice generally extends the area of influence half way to the next hole. The nearest hole to the east is 1235 feet distance and about 1150 feet to the west. As more holes are drilled at closer and closer intervals the areas of influence become progressively smaller and the sample results more representative. [H.J. Wells, Placer examination, Principles and Practices, BLM Technical Bulletin 7 (1968)] pages 32 and 33, discusses spacing of samples or drill holes. He states there are placer deposits of such characters (sic) that it is safe to project sample data several hundred feet and there are others where the gold distribution is so erratic that a ten-foot projection would be a dangerous assumption. It appears from the drilling that gold distribution is very erratic in the Pamgold placer claims. [7/]

(Ex. D at 26.)

No further explanation is given either in the mineral report or in his testimony in the hearing. What is striking is that Clemmer found the distribution of gold so uniform in his June 1995 mineral report (and on page 17 of his 1998 supplemental mineral report) that he could assign

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6/ It does not appear that any attempt was made to consider weighted averages. Cf. Field Handbook for Mineral Examiners (H3890-1), at V-3.

7/ This discussion of the importance of doing fill in drilling to assure that the samples are representative is extremely important to my discussion below. As more holes are drilled at closer and closer intervals the areas of influence become progressively smaller and the sample results more representative.

values to a 220 acre block (over 9,500,000 square feet) based on the results from six sample sites, but found it impossible to assign a value to an area greater than 0.0457 acres (2,500 square feet), based on the results from six sample sites drilled in May 1998 (page 26 of the same 1998 supplemental report). 8/

After making the above quoted conclusion that the gold distribution is very erratic, Clemmer chose a 10 foot thick "segment of pay dirt on bedrock in hole B-450" to be of sufficient value to consider development, and assigned "an area of influence to the hole of 25 feet in all directions." (Ex. D at 26.) He then calculated a square area of influence 50 feet in length on a side, or 2,500 square feet, with a volume of 25,000 cubic feet, or 926 bank cubic yards of gravel, having a gross value of $9,242 at $9.98 per bank cubic yard. 9/ Strictly for illustrative purposes, and using values set out in Clemmer's supplemental report, had Clemmer applied the "industry practice" and extended the area of influence "half way to the next hole," (See Ex. D at 26), the quantity of mineral in the area of influence would be 483,400 bank cubic yards and the value of the mineral in place would be $4,824,000. It can readily be seen that the area of influence is critical to a validity determination in this case.

Clemmer gave a fairly detailed explanation of mining cost when calculating the cost of mining in the June 1995 Mineral Report. When explaining the mining costs in his supplemental report, his explanation was very terse followed by a statement that "[v]arious costs to mine and process the ore have been estimated. Calculations are on file and available if needed." The costs were listed as follows:

1. Stripping - $4.50/BCY of ore
2. Processing ore - $34.67/BCY of ore **
3. D-8 Bulldozer - $5.70/BCY of ore
4. Miscellaneous costs $21.60/BCY of ore

   Total Mining Cost - $66.51 [sic. $66.47?] /BCY of ore

** Includes a cost of $30,000 for a used dry washer.

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8/ There are too many variables to make this assumption. Similarly, without a valid basis for doing so (such as a broad spectrum of nugget sizes in the samples (the nugget effect)), when there are a limited number of widely spaced samples, a conclusion that a deposit is very erratic is not supported by the evidence.

9/ It appears that a loose cubic yards value was used for bank cubic yards calculations (5-gallon buckets were used to measure and weigh the sample - Ex. D at 10.) If the expansion factor is 14% as stated on page 26 of Clemmer's supplemental report, the value of the material in place (BCY) would be approximately 1.14 times the loose cubic yards value. For example, if the loose cubic yards value is $9.98, the bank cubic yards value will be $11.38 per cubic yard. For the purposes of the discussion, and to make values comparable to those in the Mineral Reports, I have not made this adjustment.

Clemmer correctly notes that "[t]he economics of mining this small ore body is evident. As the BCY of ore increase the mining costs decrease." (Ex. D at 26; compare Ex. C at 23-24.) At the hearing he testified that it would cost "60 bucks a cubic [yard] to mine it or some ridiculously high figure. That is because of the small yard[age], and costs are divided by the yardage." (Tr. at 29.) Clemmer gave no description of how the mineral material Clemmer identified as "ore" would be mined, and it appears that the same mining method used in Exhibit C was chosen for this exercise. Using the per hour bulldozer rate set out in his first cost analysis, it appears that Clemmer calculated that it would take a D-8 Bulldozer and 110 hours to move the overburden and pay zone. (Ex. D at 26.) In his initial calculations he stated that it would take a little over 24 hours to move an equivalent amount of material, using an excavator with a 3 yard bucket. (Ex. D at 17.) In Clemmer's first report, the "capital" cost of a dry washer suitable for processing 7,986,000 bank cubic yards of material was estimated to cost $150,000, or $0.02 per cubic yard, with no salvage value. In his supplemental report, a dry washer suitable for processing 926 bank cubic yards was estimated to cost $30,000, or $32.40 per bank cubic yard with no salvage value. It is apparent that neither alternative mining and processing methods nor the possibility of renting the equipment was considered.

Jacquet's testimony can be summarized as a statement that he was familiar with the evidence presented by Clemmer and agreed with his conclusion that the claims were invalid.

In summary, when I reviewed the record I found a number of times that basic procedures were ignored, a number of errors in collecting and/or analysis of the data, and a number of conclusions that are either contradicted by the record or not supported by it. As a result of the problems discussed above, and others I have chosen not to address, I can give very little weight, if any, to the evidence and testimony presented by the Government witnesses.

The claimants case

When the Government challenges the validity of a mining claim, it has the burden of establishing a prima facie case that the claim is invalid. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); United States v. Pool, 78 IBLA 215 (1984). Once a prima facie case has been established, the burden shifts to the contestee to overcome that case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d at 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976); United States v. Husman, 81 IBLA 271, 275 (1984).

If, at the end of the Government's case, a claimant is of the opinion that a prima facie case has not been presented, the claimant may seek to have the presiding Judge dismiss the contest for failure to present a prima facie case. The presiding Judge must rule on the claimant's motion before the claimant presents his or her evidence.

> A motion to dismiss for failure to present a prima facie case loses its essential value if it is not ruled upon before a contestee is required to proceed with its case. The administrative law judge's ruling is absolutely critical in correctly ascertaining whether or not to proceed since, in many cases, challenges to credibility constitute a vital element in the contestee's case. Given the weight afforded by this Board to determinations of credibility based on demeanor evidence by an administrative law judge (see, e.g., BLM v. Carlo, 133 IBLA 206 (1995)), a contestee cannot fairly be forced to decide whether to present his or her own evidence or rely on the failure of the Government to present a prima facie case in the absence of a ruling by the judge on the motion to dismiss.

United States v. Galbraith, 134 IBLA 75, 102 I.D. 107 (1995). Bush, who was not represented by counsel, did not move to dismiss the contest at the end of the Government's case. After having failed to make this motion, Bush presented evidence and testimony on his own behalf.

If evidence and testimony is presented by the claimant the presiding Administrative Law Judge may consider, when determining whether the evidence does or does not support a discovery, both the evidence presented by the Government and the evidence presented by the claimant. In United States v. Willsie, 152 IBLA 241 (2000), we stated:

> The Board has noted on numerous occasions that, even if the Government has failed to present a prima facie case, evidence tendered by a contestee may be considered, not for the purpose of curing any of the deficiencies in the Government's prima facie case, but for the purpose of determining whether or not this evidence, when considered in the context of all of the other evidence of record, affirmatively established that the claim is invalid. See, e.g., United States v. Miller, [138 IBLA 246] at 269-71; United States v. Knoblock, 131 IBLA 48, 82, 101 I.D. 123, 141 (1994); see also United States v. Opperman, 111 IBLA 152, 153 (1989).

United States v. Willsie, supra at 253. With this in mind, I will examine the evidence Bush presented.

Richard L. Schmittel was the chief witness presenting testimony on the Bushes' behalf. He is a mining engineer with a great deal of experience in placer gold operations and is qualified to testify as an expert witness. Schmittel testified about the difficulty he had gaining permission to go on the property and the limited work he was permitted to do after gaining permission. The topographical survey and mapping of the claims and the subsequent geophysical survey gave him the information regarding the size and shape of the gravel deposit necessary to set out an

initial drilling program. After trying for almost two years to get permission to drill six widely spaced holes on the property, Bush was given very little notice and a very short window period to do the Phase 3 work.

Schmittel explained that he had a limited budget, and the costs were higher than they might otherwise have been because he had been given little notice and a very small window of opportunity to do the drilling. He noted that two years after he requested permission to drill, the Army granted permission, but gave only two weeks from the date of approval to do the drilling. No explanation of the delay was ever offered, either before or during the hearing. 10/ The widely spaced holes were drilled along the three seismic lines (A, B, and C) established during the Phase 2 program, and identified by reference to those lines. Schmittel agreed with Clemmer's observations that the results were not as informative as they might have been if the holes had been cased, but explained that by not casing the holes there was a risk that the gold recovery would be lower than it would be if the holes had been cased.

Schmittel was understandably critical of Clemmer's initial sampling program, noting that the samples Clemmer took were not representative. He testified at length regarding the drill results. He stated that in the three "A" series drill holes on the Pamgold 15 claim the results were "interesting but sub-economic values" (Tr. at 60). When asked what his determination was regarding the A series assay results, Schmittel stated:

> [T]he line A was significant, but except for one possible, I wouldn't say, really economical thing, but we found different bedrock there. It was a soft clay-type bedrock which is not conducive to the concentration of placer gold like the granitic-type bedrock at the other two holes. * * * [W]e would need to determine the contact, where the bedrock changes from the hard-type to a soft material and stick with the hard-type bedrock on the location of commercial deposits. * * * Then we would need to * * * go with a better type of drilling system and closer spaced holes to start proving. The resource right now is an indicated reserve with some real good numbers. But zero extension out on it. Again we cannot get into it. We had a very limited window by the Army. They said "No more in there." We could not expand our program.

(Tr. at 68.)

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10/ Judge Hammett cited the claimant's limited financial resources as a basis for finding that the Army did not unduly prevent Bush from doing further drilling. See Decision at 7. However, I also note that Schmittel expressed his willingness to invest in the claims if offered an opportunity to get access to the Depot lands. (Tr. at 80.) However, whether the

Schmittel stated that the best results were found in the drill hole on the "B" line identified as B-450, which intercepted "high grade value." (Tr. at 61.) When commenting on the results from hole C-430, drilled on the Pamgold No. 8 claim, he stated that "we had an excellent value on that hole, as well." Id. However, he believed that C-230 contained no significant concentrations of gold." (Tr. at 68.)

Schmittel believed that two of the drill holes had good intercepts. He then noted that

> [i]f we had two or three additional rounds to go in and do more drilling and spread out exactly what Mr. Clemmer was suggesting that should be done. Then we would be able to take it out into a proven resource category. Right now he is right; it is a possible reserve. And, yeah, you have to do a fifty [foot] square, something like that, to calculate anything. I didn't put a cost calculation into this because there is no basis to it.

(Tr. at 58-59.)

When asked whether there was a discovery, Schmittel stated that "we would not find a good commercial deposit until we test to the contact between the two different bed rocks, and I don't know where that is." (Tr. at 70.) He stated "hole number A-240, from 95 to 105 [feet] — $3, $9. That is very anomalous. That is very close. That is a very interesting piece. I can't say it is economic to mine it, but it is anomalous. I would want to expand from a -- " (Tr. at 70-71.)

Schmittel stated that it was his opinion that a hole at a location identified as hole C-530 located 100 feet to the north of hole C-430 was the "optimum place for a hole to be drilled." Id. He then explained that the reason no hole was drilled there was they could not get the drill truck to that site. (Tr. at 71-72.) Schmittel concluded his direct testimony by stating that

> [M]y conclusion is that these claims are valid, and that we proved so with this drilling program, as limited as

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fn. 10 (continued)
claimant has or does not have the financial wherewithal to do further drilling should have no bearing in a prudent man determination. Again I find it necessary to note that the prudent man test is an objective test. "[T]his Board has held repeatedly that the test of whether there has been a discovery of a valuable mineral deposit on any claim is an objective test, not a subjective one, and that the financial abilities of the claimants are irrelevant to this inquiry." U.S. v. Onida Pearlite Corp., 57 IBLA 167, 189 (1981). What matters is what a prudent man would do, not what a claimant can afford to do. When a claimant's financial status is made a factor in a discovery the prudent man test has become subjective.

> it is. Again, would be great to expand exactly the way Mr. Clemmer suggested, but we don't have access to do so.

(Tr. at 73, emphasis added.)

In response to a question from Judge Hammett, Schmittel explained the reason he did not undertake a specific economic analysis. He stated that "one hole * * * doesn't prove anything. It indicates it has to be expanded out in that. Without access, we can't do that." (Tr. at 74.)

During cross-examination Schmittel acknowledged that it was his understanding that "a prudent man has to come to the conclusion that it is worthwhile to develop a mine." He explained that mere exploration is not enough, that a prudent man

> starts out with a first find. Then he has to spend some more money for additional exploration until he proves a deposit. Then goes ahead. Prudent approach. I think that is what we have here, is that first find. But we don't have access to go finish the next phase of it.

(Tr. at 78.) He then stated that he had no idea of the extent of the gold bearing deposit. Id.

The decision below.

On January 12, 2002, Judge Hammett issued his decision. He noted that the central issue in the case was whether the Pamgold Nos. 8, 12, and 15 were supported by a discovery. Judge Hammett held that there was sufficient evidence to support a prima facie case that the claims were invalid. After considering the number and severity of the problems I have outlined above, I find it more appropriate to consider whether the evidence as a whole affirmatively established that the claim is invalid. See United States v. Willsie, supra; United States v. Pool, supra at 220; United States v. Opperman, supra at 153.

The decision also addressed the Bushes' case. After stating that Schmittel had concluded that the mineral values in one of the Phase 3 drill holes supported a discovery in the Pamgold No's. 8 and 12 claims, Judge Hammett then set out his analysis of the case and concluded that the "Pamgold Nos 8, 12, and 15 claims are null and void for lack of a discovery of valuable mineral deposit-gold." Decision at 10. I agree with this conclusion.

Schmittel, the primary witness for the claimant, clearly demonstrated that there was sufficient physical evidence of mineralization on three of the claims to justify further expenditure of time and money in efforts to determine whether or not there would be a reasonable prospect of success in developing a profitable mining operation. Unfortunately, as Schmittel admitted, there are not sufficient number of these exposures to undertake

the economic analysis necessary to determine whether mine development is warranted.

The claims are invalid because there are not a sufficient number of exposures of high grade gravels in the drill holes to make the projections necessary to find that the volume of high grade gravels warrants a conclusion that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The preponderance of the evidence prompts me to agree with Schmittel's professional judgement that the intercept values in two of the holes are encouraging anomalies that justify further drilling to determine the extent of the high value gravels.

A prudent exploration geologist will examine the geology of an area that might contain sufficient quantity of a mineral in a concentration sufficient to allow the development of a profitable mine. Mineral exploration is a constant evaluation of both the size of a deposit (quantity) and the concentration of values in that deposit (quality). Often a deposit will be large enough but not rich enough, or rich enough but not large enough, to warrant the development of a mine.

In this case all of the parties appear to agree that there is a sufficient quantity of auriferous gravel. The Government mineral examiner was willing to assume that the claims contained 15 million cubic yards of auriferous gravel. (Ex. C at 23; Ex. D at 17.) The geophysical survey the claimants conducted was along three seismic lines to gain a better knowledge of the quantity and shape of the gravel deposit. The shape of that deposit is shown in three cross-sections depicted in Exhibit 2. An alluvial deposit is shown in all three cross sections, and a reasonable projection can be made that the gravel extends, without a break, the full distance between them. This conclusion can be made without drilling.

The drilling program was undertaken to ascertain the concentration of gold in the auriferous gravel. It can be reasonably expected that the concentration of gold in the gravel varies both with depth and from place to place within the deposit. However, because of the nature of placer gold deposition, the greatest values are most often found in the bottom fraction of the deposit. This expectation has been confirmed by the drilling on the claims. The drilling was conducted along the three seismic lines of the geophysical survey running across the valley. Line A is the most easterly and upstream line, B is in the middle line and C is the lowest in the canyon and most westerly, and the lines are approximately 1000 feet apart. (See Map in Ex. F)

As noted above, in his 1998 Supplemental Mineral Report, Clemmer notes the practice of extending the area of influence half way between sample sites. (Ex. D at 26.) However, he chose not to allow that projection because of the "very erratic" gold distribution. (See, however, note 7.) A factor more important to my conclusion is Schmittel's testimony that he was unwilling to make any projections of the area of

influence based upon the knowledge gained from the six drill holes. (Tr. at 74.) 11/

The impact of not drilling additional holes

I will now address the aspect of this case that concerns me the most A valuable mineral deposit has been found on the claims. In the three "A" series drill holes, drilled along the most easterly line, the results were "interesting but sub-economic values." (Tr. at 60.) The best results were found in the drill hole on the middle or "B" line. Hole B-450, intercepted a 10 foot zone Schmittel described as having "high grade value." (Tr. at 61.) Commenting on the results from hole C-430, Schmittel stated that "we had an excellent value on that hole, as well." Id. Gravel is exposed at the surface and was exposed in all of the drill holes. Thus, the gravel deposit can be reasonably projected to exist the full distance between lines A and C. The remaining question is the size of that portion of the gravel deposit represented by the values found in hole B-450, and possibly the C series holes.

If the values found in hole B-450 extend the full distance to lines A and B, the mineralization would clearly be sufficient to support a discovery. If those values extended no more than 25 feet in any direction, the values found in hole B-450 would not support a discovery. The additional drilling that Schmittel sought to do was "step out" or "fill in" drilling between lines A and C. Schmittel did not consider the further drilling to be exploration designed to find a mineral deposit. The purpose of this additional drilling was to gain the information necessary to make a meaningful projection of the value of the mineral intercepted in hole B-450 and the other five drill holes.

In United States v. Foresyth, 15 IBLA 43 (1974), this Board addressed whether a claimant could conduct drilling after the land had been withdrawn. The Board stated that

> evidence in the case at bar was admissible to the extent that it confirmed and corroborated pre-existing exposures of a valuable mineral deposit, even assuming the withdrawal application segregated the land from mineral location.

United States v. Foresyth, supra at 48. In that case the claimants had exposed mineral of a quality that would support a discovery. The question that was to be resolved by the proposed drilling was the quantity of mineral in place of sufficient quality to be mined at a profit. Drilling was ordered, and the drilling conducted after the withdrawal

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11/ Again, it would not seem appropriate to state that a deposit is uniform in character based upon the result of a very limited number of widely spaced sample sites. Similarly, a conclusion that a deposit is very erratic cannot be drawn from a limited number of widely spaced sample sites. There is simply too little evidence to support either conclusion.

supported a discovery. See United States v. Foresyth, 100 IBLA 185, 94 I.D 453 (1987) (Foresyth II). Commenting again on sampling after withdrawal, we noted in United States v. Waters, 146 IBLA 172, 182 (1987):

> A distinction is properly drawn, however, between discovery of a valuable mineral deposit and the samples taken to verify the value of the deposit. In [Foresyth II, 100 IBLA at 207, 94 I.D. at 465], we noted that
>
> > the acts of sampling and assaying are acts which either confirm or disprove the existence of a discovery. Thus, if there was a disclosure of mineral at the date of withdrawal from mineral entry, that disclosure is a discovery of valuable mineral if subsequent sampling, assaying, and testing confirm the fact that the disclosed mineral is valuable. Thus, assay results from diamond- drill intercepts of the mineralized zone will support a conclusion that there was an exposure of valuable mineral if reasonable geologic projection leads to a conclusion that the intercept and the exposure are from the same mineralized structure.

In the case now before us, Schmittel testified that when they completed the six approved holes drilled under the Phase 3 Program, the Department of the Army refused to allow any further drilling on the claims. This testimony is unrebutted. Schmittel and Clemmer agreed that further drilling would be necessary to determine the extent of the mineralization disclosed in drill holes A-240 and B-450. They both stated that the values found in those holes would support a discovery, if found in sufficient quantity. However, the drilling necessary to make that determination could not be carried out because permission to do so was denied by the Department of the Army. 12/ In United States v. Parker, 82 IBLA 344, 383, 91 I.D. 271, 294 (1984), this Board stated:

> We have held that mining claims are not properly declared null and void for lack of discovery where the mineral claimants are effectively foreclosed from proving that a discovery exists. United States v. Foresyth, 15 IBLA 43 (1974). We have further recognized that while, in cases of withdrawal of the land, such withdrawal entitles the Government to restrict the development of a claim, restrictions must be reasonable "in order to permit a claimant a fair opportunity to make [its] case." United States v. Niece, 77 IBLA 205, 207-08 n.3 (1983).

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12/ This refusal to allow further drilling should not be confused with or coupled to any allegations of delay or any real or imagined failure on the Bushes' part to develop the claims prior to the Phase 3 drilling. The inability to do the post Phase 3 drilling directly impinged the Bushes ability to defend their claim at the time of the hearing.

Under different circumstances, I would find it appropriate to remand this case for a further hearing with instructions that the Bushes be allowed to do the further drilling necessary to delineate the extent of the mineralization exposed by the Phase 3 drilling prior to the hearing. In American Independence Mines and Minerals, Co. v. United States Dept. of Agriculture, Civ. No. 00-291-S-BLW (D. Idaho, filed Aug. 2, 2002) (slip. op. at 9-10), the reviewing court referred the above-quoted ruling in Parker as "consistent with the Due Process Clause for allowing claimants a full opportunity to make their case for claim validity." In Parker and American Independence Mines, the land under the control of the surface management agency had been withdrawn from location and the reasons for restricting access were more compelling than they are in this case.

This matter was referred for a hearing in 1994, and the Court of Claims is understandably concerned. By far, the greatest portion of the delay in this case can be directly attributed to the Army. This Board does not have jurisdiction over the Department of the Army and therefore cannot direct that Department to allow further drilling. See Exxon Corp., 95 IBLA 374, 375 (1987); Beard Oil Co., 88 IBLA 268, 271-72 (1985); Donald Ernest Willkens, 77 IBLA 144, 146 (1983). Had BLM denied permission to drill in this case, this Board could have either vacated that decision for failure to give valid reason for refusal, or reversed the denial decision, if the reason was deemed invalid. 13/ A decision must be supported by a rational basis and that basis must be stated in the written decision, as well as being supported by the administrative record.

There is nothing in the record supporting the Department of the Army's refusal to grant permission to do the step out drilling designed to verify the extent of high grade mineralization disclosed during the Phase 3 program. Had permission been granted and the drilling done, I would not find it necessary to comment about the Army's failure to allow further drilling. If the drilling had taken place, we would probably not be considering this appeal, regardless of the outcome of the drilling. The extent of the deposit would be known.

I cannot fault claimants for the failure to establish sufficient quantity of mineral material to support a discovery on the claims on the date of the hearing. There is ample unrefuted testimony and evidence that the grant of access to do the step out drilling was denied by the surface managing agency. In American Independence Mines, supra, the court concluded that this Board erred when finding the American Independence claims invalid because the surface managing agency denied permission to perform assessment work. The court stated that the Forest Service "must recognize AIMMCO's right to prepare for the validity hearing, and allow work to that end * * *." Id. at 11. Approval for further drilling must

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13/ See The Navajo Nation, 150 IBLA 83 (1999), for an example of a vacated decision. See Pogo Producing Co., 138 IBLA 142 (1997), for a case that was reversed because the record did not support the decision.

come from the Army, and this Board is not in a posture where we may await such approval. I am left with no alternative but to affirm and allow this case to be returned to the Court of Claims.

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R.W. Mullen
Administrative Judge